

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Corp. Petition for Declaratory Ruling	)	
Regarding Enhanced Prepaid Calling Card	)	WC Docket No. 03-133
Services	)	

COMMENTS OF QWEST SERVICES CORPORATION

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Qwest Services Corporation (“Qwest”)<sup>1</sup> hereby files these comments in response to the Petition for Declaratory Ruling (“Petition”) filed May 15, 2003 by AT&T Corp. (“AT&T”).<sup>2</sup>

I. INTRODUCTION AND SUMMARY

AT&T seeks a declaratory ruling that the jurisdiction of a long distance call made using a prepaid calling card should be determined based on the locations of the calling card platform and the originating calling party. According to AT&T, a caller in Houston, Texas, making a call to Dallas, Texas, makes an interstate telephone call if the calling card platform used to set up the call is located in Illinois. This jurisdictional issue is vital, notes AT&T, because there is a vast difference between interstate and intrastate access charges.<sup>3</sup> Because of this dramatic difference in access charges, AT&T claims that allowing (or requiring) carriers to pay intrastate access rates for long distance calls set up via a prepaid calling card platform would substantially increase

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<sup>1</sup> Qwest Services Corporation is a wholly-owned subsidiary of Qwest Communications International Inc. that provides a range of services as the parent company through various Qwest affiliates including long distance, local exchange and other telecommunications services. As of June 23, 2003, Qwest has relocated its Washington, DC office. Service may be made on Qwest at its new location, Suite 950, 607 14<sup>th</sup> Street, N.W., Washington, DC 20005.

<sup>2</sup> See *Public Notice*, DA 03-1896, rel. June 5, 2003.

<sup>3</sup> Petition at 7.

service costs, reduce the availability of prepaid calling card services, and have a particularly harsh impact on low income and poor Americans.<sup>4</sup>

AT&T's arguments in support of this position are uniformly clever, often ingenious. AT&T points out a number of difficult issues that will continue to arise (and potentially make the jurisdiction of a particular call irrelevant) as technology continues to develop. However, AT&T's approach to resolving these problems -- establishment of a subset of intrastate long distance calls classified as interstate -- is neither appropriate nor consistent with the law because the jurisdiction of a call is to be determined based on the end points of the call. This is true regardless of whether public policy goals might be better served if the call were assigned to another jurisdiction. AT&T's Petition is premised on the fallacy that it can, for public policy reasons, classify a call from Houston to Dallas as an interstate call. The fact that intrastate access rates may be high, even excessive, or that, in at least some configurations, it may be difficult to apply the proper access charges to all calls, provides no basis upon which the Federal Communications Commission ("Commission") can ignore the fact that a call between Houston and Dallas is an intrastate call, no matter what (or where) the intermediate technology. Qwest does not dispute that AT&T raises some legitimate public policy questions that merit consideration by regulators, especially if AT&T's claim that poorer citizens are adversely affected by access charge levels is valid. But even the soundest public policy arguments cannot overcome the actual jurisdiction of an intrastate telephone call, and seeking to accomplish public policy objectives through manipulation of well established jurisdictional principles is, Qwest submits, a singularly bad way of addressing this issue.

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<sup>4</sup> *Id.* at 2, 7.

II. AT&T'S PETITION SHOULD BE DENIED BECAUSE IT MISINTERPRETS THE LAW REGARDING THE JURISDICTION OF AN INTERSTATE OR INTRASTATE COMMUNICATION.

1. Factual Background

The service addressed by the Petition is described as follows.<sup>5</sup> A customer with a prepaid calling card dials an 800 number and is connected to the AT&T prepaid calling card platform. After the caller has entered a PIN, the platform plays a commercial that the caller must listen to if he or she desires to make a prepaid calling card call. Once the commercial is over, the platform permits the caller to launch the long distance call by dialing in the terminating number. The platform remains engaged during the call, rating the call, debiting the card and providing messages concerning the card. The caller can make calls to multiple destinations via a single 800 call to the prepaid calling card platform. It is fair to say that no one, or almost no one, calls the platform solely to hear the commercial, and that, to the contrary, the sole purpose for calling the 800 number is to initiate a long distance call.

AT&T contends that, in practically all instances, calls involving the platform are interstate long distance calls, subject to the jurisdiction of this Commission. This is important because interstate calls pay for switched exchange access at interstate rates, not intrastate rates and, as AT&T points out, intrastate rates can be dramatically higher than their interstate counterparts (notwithstanding that the services are absolutely identical). AT&T claims that it is currently paying interstate access rates for most calls involving the prepaid calling card platform, based on its theory that all calls involving the platform really involve two separate calls, one from the calling party to the platform, and one from the platform to the called party. AT&T finds that this practice is being threatened because states are beginning to take notice of the calls

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<sup>5</sup> *Id.* at 6.

and investigate them. AT&T claims that “[a]t least one state commission . . . has recently begun to seek information about the nature of these services, apparently as a prelude to permitting imposition of intrastate access charges on these services, on the assumption that such calls are intrastate calls.”<sup>6</sup>

AT&T accordingly requests that this Commission intervene and issue a declaratory ruling that calls involving the platform are interstate based upon one of two theories: 1) The “two call” theory, whereby calls involving the platform actually are classified as two calls, one from the calling party to the platform, and one from the platform to the called party. Each call is rated individually for jurisdictional purposes. 2) The “commingled” theory, whereby calls involving the platform are treated as a combination of interstate and, potentially, intrastate calls that are classified as interstate in their entirety. Qwest comments briefly on each of AT&T’s arguments.

2. AT&T Erroneously Argues That The Call Is Comprised Of Two Different Calls Because The AT&T Platform Provides An Information Service To The Caller.

AT&T first argues that, because the prepaid calling card platform provides an information service to the calling party (namely, the commercial which the calling party must listen to before making a call), the information service establishes both the nature of, and the jurisdiction of, the call to the platform.<sup>7</sup> If the customer chooses to use the platform to make a long distance call, AT&T concludes that a different call is established whose jurisdiction is measured between the platform and the called party. The Commission has, of course, long held that the jurisdiction of a call to an 800 number that is then transferred to the switch of another carrier for termination is measured based on the locations of the calling and called parties, and that an 800 platform that engages in this type of call processing is not a jurisdictional “end point”

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 9-10.

of a call.<sup>8</sup> The purpose of the AT&T prepaid calling card platform is to process calls and to provide the billing functionality necessary to permit such calls to be completed.

- a. Subjecting a caller initiating a long distance call with a pre-paid calling card to an involuntary commercial message does not create an enhanced service.

AT&T's first argument, that addition of a commercial message to a prepaid calling card platform creates an enhanced service, is based on a misconception of the enhanced service rules. A prepaid calling card and its platform are a billing mechanism that aids in the establishment of a communications path. The fact that a caller is subjected to a commercial message as part of the price for making the call does not diminish this primary billing and call set-up functionality at all.<sup>9</sup> While the commercial message itself appears to fit within the literal definition of an information/enhanced service, the calling party is not making the call to the platform in order to hear the commercial message. The commercial message is thus a method of reducing the cost of the call to the end user rather than an actual service offered to the public.<sup>10</sup> Even if classified as enhanced, the commercial message would only be incidental to the underlying call between the two end-user points, which would still be categorized for jurisdictional purposes based on the end points of that call.

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<sup>8</sup> See, e.g., *Teleconnect Company v. The Bell Telephone Company of Pennsylvania*, 10 FCC Rcd. 1626, 1629-30 ¶¶ 12, 14 (1995), *aff'd*, *Southwestern Bell Telephone Company v. Federal Communications Commission*, 116 F.3d 593 (D.C. Cir. 1997).

<sup>9</sup> Qwest assumes that AT&T charges the advertiser for the placement of these commercial messages. See Petition at 6.

<sup>10</sup> Assuming that AT&T collects revenue from advertisers and uses this revenue to reduce its competitive long distance prices. Of course, even if AT&T allows merchants to advertise on its prepaid calling platform for free, customers still do not call the platform in order to hear the commercial.

AT&T's reliance on *Northwestern Bell Telephone Company*<sup>11</sup> in this regard is instructive. In *Northwestern Bell* the Commission declared that a provider of talking yellow pages was providing an enhanced service that exempted the provider from payment of interstate switched access charges. While the decision was subsequently vacated,<sup>12</sup> the basic analysis that talking yellow pages constitutes an enhance service remains valid. But AT&T misses two key points in that analysis. First, in the case of talking yellow pages, a customer called the computer platform for the purpose of listening to the recorded announcements, not for the purpose of placing a long distance call. The provider of the talking yellow pages service, while classified as a non-dominant carrier when it provided common carrier services, operated entirely as an enhanced service provider in offering the talking yellow pages service. Indeed, the sole purpose and function of the talking yellow pages service was to play the announcement for the caller, not, as the case in the AT&T service, to make a long distance call.

Second, the Commission expressly recognized in *Northwestern Bell* that the situation (payment of access charges) would be different if any carrier services by the offeror of talking yellow pages were involved.<sup>13</sup> AT&T does not claim, or at least does not appear to claim, that, by offering a commercial as part of a long distance service it has created a totally new enhanced service and has exempted the entire service from access charges altogether. Were it to make such a claim, *Northwestern Bell* would stand in opposition to the AT&T position. In fact, *Northwestern Bell* demonstrates how far AT&T has strayed from the legal analysis on enhanced service classification that forms the basis of its analysis.

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<sup>11</sup> Petition at 9-10 n.7, 18 n.29. *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling, Memorandum Opinion and Order*, 2 FCC Rcd. 5986 (1987), *vacated on other grounds*, 7 FCC Rcd. 5644 (1992).

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*, 2 FCC Rcd. at 5988 ¶ 21.



The AT&T long distance service remains a common carrier service. The prepaid calling card platform remains a billing and enabling platform that does not affect the jurisdiction of the call. The addition of a commercial message in this context is legally irrelevant because the commercial message is extraneous to the purpose of the call and the underlying functions provided by the platform and by AT&T.

- b. Even if the commercial message provided on the prepaid calling card platform constituted an enhanced service, the AT&T common carrier service would be measured on an end-to-end basis, not on the location of the calling card platform.

Moreover, for jurisdictional purposes, even if we were to take AT&T's analysis at face value and assume that the call to the platform and receipt of the commercial message constituted a discrete call (and possibly an information service), the second call in this scenario would not be from the platform to the called party. Instead the second call would be from the calling party to the called party. In this scenario, the call to the platform (and receipt of the commercial message -- *i.e.*, the information service) would be one call whose jurisdiction would be based on the locations of the calling party and the platform. The jurisdiction of the second call (in our initial example, from Houston to Dallas) would still be intrastate in nature based on the end points of that individual call. The jurisdiction of the long distance call between Houston and Dallas remains the same even if the initial call to the AT&T platform constituted a call to an AT&T information service because of the existence of the commercial message.

Qwest recognizes that there may be instances in the future where a data transmission between two end points is so inextricably intertwined with communications with a centralized server that it is impossible to jurisdictionalize any part of the call. Data transmissions using the public Internet provide a current example of such communications. But this is not the case with the AT&T platform, which functions primarily as a vehicle for setting up voice communications

on a common carrier basis. The addition of a commercial message in the functionality provided by the AT&T platform does not alter the basic common carrier nature of the service actually offered to and provided to the calling party -- long distance service. This is true whether the commercial message is treated as part of the call set-up and billing functionality or as an independent information service. There is no reason why an intrastate long distance call using the AT&T platform should be classified as anything other than an intrastate call.

3. An Intrastate Call Would Still Be Intrastate In Nature Even If It Were Commingled With Other Indisputably Interstate Calls.

AT&T's final argument relies on more traditional preemption analysis. AT&T claims that, because there are indisputably interstate components to at least some calls between Houston and Dallas, and these interstate components are inseverable from the intrastate call between these end points, the entire call must be interstate in nature. AT&T cites the Internet Service Provider jurisdictional order,<sup>14</sup> the Commission's decision on "vendor intercepted services,"<sup>15</sup> and the *BellSouth MemoryCall Order*<sup>16</sup> in support of this proposition.

In addition to relying again on the argument that the call to the platform is interstate in nature, AT&T notes that the calling party can make multiple calls to called parties in multiple jurisdictions with a single call to the calling card platform.<sup>17</sup> Accordingly, AT&T contends that the overall call must be interstate in nature because it cannot be fragmented into interstate and intrastate components. In such a case, argues AT&T, the call is much like a call to a conference bridge, which is generally rated based on the location of the bridge, not on the locations of the

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<sup>14</sup> Petition at 15 n.23, 16-17 n.27.

<sup>15</sup> *Id.* at 18 n.30.

<sup>16</sup> *Id.* at 15 n.22.

<sup>17</sup> *Id.* at 20-21.

parties to the conference call.<sup>18</sup> But AT&T does not actually seek preemption and does not make a case justifying preemption.

AT&T's position raises some practical points that are already addressed by incumbent local exchange carrier ("LEC") tariffs. For example, as AT&T notes, a calling party can use the platform to establish a call from Houston to Dallas and, without disconnecting the initial communication to the platform, establish a second call from Houston to New York. In such a circumstance, it might be difficult, if not impossible, for the originating incumbent LEC to properly assess the jurisdiction upon which originating access would need to be charged. This is because the originating LEC would see only the 800 number in determining the jurisdiction of the call. AT&T gives no information on whether terminating LECs would see the originating phone number or a trunk number assigned to the platform.<sup>19</sup> However, carriers must deal with calls of indeterminate jurisdiction on a daily basis, and incumbent LEC tariffs uniformly provide a manner of jurisdictionalizing traffic when the calling party number is either not transmitted or does not accurately reflect the jurisdiction of a call, typically by requiring a carrier to report a percent of interstate usage.<sup>20</sup> The fact that AT&T might need to report some of its intrastate traffic as intrastate under these tariffs hardly provides a basis for Commission interference in the rates charged for termination or origination of an intrastate call. If a long distance caller using the AT&T platform makes an interstate call and an intrastate call on the same session, it is up to AT&T to properly report the jurisdiction of both calls. The fact that such reporting may be difficult does not alter the jurisdiction of either call. A discrete call, or more than one call, will

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<sup>18</sup> *Id.* at 8.

<sup>19</sup> As AT&T has SS7, we assume that AT&T is transmitting the originating calling number to the terminating LEC. *See* 47 C.F.R. § 64.1601(a).

<sup>20</sup> *See* Qwest Corporation, Tariff FCC No. 1, §§ 2.3.10 and 2.3.12.

ultimately be made between the two end points selected by the caller (*i.e.*, the calling and called number). Those discrete calls determine the jurisdiction of the calls themselves, notwithstanding jurisdictional issues surrounding other aspects of the calls.

In fact, the Commission has ruled that it will defer to state regulators on matters concerning rates for intrastate traffic, even in those instances where an interexchange carrier claims that intrastate rates are being erroneously applied to interstate traffic.<sup>21</sup> What charges apply to an intrastate telephone call is a matter for state judgment in the absence of a compelling need for federal intervention. The fact that states are trying to figure out how such calls should be rated for jurisdictional purposes would appear to be a far cry from the types of harm that are necessary to justify preemption.<sup>22</sup>

We submit that AT&T has not made a showing that would permit the FCC to preempt state regulation of intrastate calls made using the AT&T prepaid calling card platform. In fact, while the cases relied on by AT&T involve Commission preemption, AT&T does not actually request that this Commission exercise its preemptive authority. AT&T instead relies on an effort to have intrastate calls declared to be interstate. This effort has no basis in law and must be rejected.

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<sup>21</sup> *LDDS Communications, Inc. v. United Telephone of Florida*, 15 FCC Rcd. 4950 (Chief, Enforcement Bureau, 2000).

<sup>22</sup> *In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, Memorandum Opinion and Order*, 7 FCC Rcd. 1619, 1622-23 ¶¶ 18-21 (1992).

III. CONCLUSION

For the foregoing reasons, the AT&T Petition should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST SERVICES CORPORATION** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served, via email on Paul Moon of the Wireline Competition Bureau, 3) served, via email on the FCC's duplicating contractor Qualex International, Inc., and 3) served, via First Class United States mail, postage prepaid, on the remaining parties listed on the attached service list.

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June 26, 2003

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